GF LLP GOETZ FITZPATRICK LLP
Attorneys at Law www.goetzfitz.com
One Penn Plaza, New York, NY 10119 | 212-695-8100 | (F) 212-629-4013

Douglas Gross
Extension: 286
dgross@goetzfitz.com

September 16, 2015

BY ECF

The Honorable Eric N. Vitaliano
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Travel Sentry, Inc. v. David Tropp*
Case No. 06-cv-6415 ("Travel Sentry")

David Tropp v. Conair Corp. et al.
Case No. 08-cv 4446 ("Conair")

Dear Judge Vitaliano:

We write on behalf of David Tropp in both of the above referenced cases to seek a pre-motion conference for leave for Tropp to file a cross-motion for summary judgment on infringement. We seek to make that motion in light of the new test for direct infringement as set forth in the recent ruling in Akamai Tech., Inc. v. Limelight Networks, Inc., __F.3d__, 2015 WL 4760450 (Fed. Cir. 2015) (en banc).

In that case, the Federal Circuit ruled that an entity was responsible for others' performance of method steps in two sets of circumstances: (1) where that entity directs or controls others' performance, and (2) where the actions form a joint enterprise. Id. at 4760450

The Court continued:

> To determine if a single entity directs or controls the acts of another, we continue to consider general principles of vicarious liability. See BMC, 498 F.3d at 1379. In the past, we have held that an actor is liable for infringement under § 271 (a) if it acts through an agent (applying traditional agency principles) or contracts with another to perform one or more steps of a claimed method. See BMC, 498 F.3d at 1380-81. We conclude, on the facts of this case, that liability under § 271 (a) can also be found when an alleged infringer conditions

GOETZ FITZPATRICK LLP

> participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method and establishes the manner or timing of that performance. Cf. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005) (stating that an actor "infringes vicariously by profiting from direct infringement" if that actor has the right and ability to stop or limit the infringement). In those instances, the third party's actions are attributed to the alleged infringer such that the alleged infringer becomes the single actor chargeable with direct infringement. Whether a single actor directed or controlled the acts of one or more third parties is a question of fact, reviewable on appeal for substantial evidence, when tried to a jury.

Id. at 4760452.

The facts in Akamai as concerns direct infringement are extremely similar to the facts in the Tropp cases. In Akamai, the Federal Circuit reversed its previous ruling of non-infringement to infringement under the new test.

Tropp, with respect, would suggest a schedule where Tropp would be given 30 days to file its cross-motion for summary judgment; Travel Sentry and the Conair defendants would have 30 days to respond; and Tropp would have 14 days to file a reply (if any). It is further submitted that allowing Tropp to file his cross-motion under this new test would expedite the process of this case and greatly conserve the resources of the parties and this Court.

Respectfully submitted,

/s/Douglas Gross

Douglas Gross

cc: William L. Prickett, Esq.
Peter I. Bernstein, Esq.
Brian A. Carpenter, Esq.
Tod S. Chasin, Esq.
Quentin R. Corrie, Esq.
Carolyn Juarez, Esq.
Robert J. Kenney, Esq.
Christopher F. Lonegro, Esq.
Neil P. Sirota, Esq.
Jennifer Tempesta, Esq.
Zachary W. Berk, Esq.